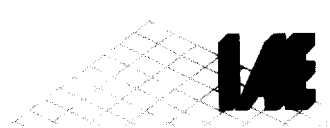


- h) **Wireless Companies, especially when their infrastructure requires the building of terrestrial facilities. Some wireless companies manage to construct and operate their infrastructures without using rights-of-way -- see below, while others do not**

9. Several major T-I-E entities provide a wide range of local, regional, national and even global transmission paths without the need for rights-of-way:

- a) **Satellite Communication Companies that provide data, video, and voice from their satellite systems directly to homes and offices.**
- b) **Digital Microwave Service Providers that offer point-to-point data and voice services. According to an article in the Economist, September 30, 1995, p.SS8, the European Commission estimates that there are around 700,000 private networks in the U.S., many relying on digital microwave.**
- c) **Cellular companies, personal communications service (PCS) providers, and paging firms. Cellular companies include some of the nation's major telecommunications corporations, including AT&T, Bell Atlantic-Nynex, SBCC-PacTel, GTE, AirTouch, et al. These same companies and others such as Sprint-DT-FT-TCI-Comcast-Cox, are also major PCS providers. Wireless companies generally seek antenna sites in order to construct their networks as opposed to requiring rights-of-way for terrestrial facilities.**
- d) **High Capacity Wireless Companies such as Teligent, Winstar, Broadband Networks, Inc., et al. These companies are entering the market to provide fiberless broadband services to business customers.**
- e) **Over-the-air broadcasters, for example the radio and TV conglomerates -- ABC-Disney, CBS-Westinghouse, NBC-GE, Fox, et al.**

10. Beginning in late 1993 and early 1994, growth of the Internet and World Wide Web began to create a new easy-to-use information source for virtually any topic that users could readily access once they replaced their older PCs with newer, faster units. This growth, fueled by computer and software companies such as Microsoft, Intel, IBM, Compaq, et al, and Internet equipment providers such as Cisco Systems, Bay Networks, and others, that manufacture routers, and manufacturers of lightwave equipment, such as the Ciena Corporation, have contributed to the increased efficiency of telecommunications infrastructures in the U.S. and abroad. These developments are causing a shift from the circuit switched environment of the past, which formed the basis of what is known as the public switched telecommunications network (PSTN), to the much faster broadband packet switched environment of the future.



11. Several new companies are taking advantage of these technological, marketplace, and business developments in order to compete with older and formerly dominant companies. These new companies include Qwest Communications International Inc. of Denver that is in the process of acquiring LCI, the nation's sixth largest IXC; IXC Communications Inc. of Austin, TX; and PSINet of Herndon, VA, which are on a growing list of companies that offer universal Internet Telephony using their own backbone fiber capacity and/or the capacity of other entities.

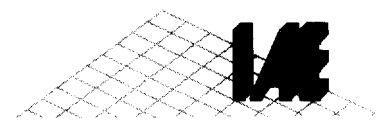
12. All of this illustrates the fact that the T-I-E industry is complicated, competitive, and collaborative, as the nation -- and the world -- evolves from a circuit switched to a packet switched broadband era in which video, data, and voice communications can be delivered simultaneously by a variety of potentially competing networks - wireline, wireless, satellite, cable TV, and, yes, even plain-old broadcast radio and TV. The effect and significance for Minnesota is that there will be a variety of competing transmission paths, or mediums, over which voice, video, and data can be delivered to homes, offices, educational institutions, hospitals, and government buildings, etc. In effect, Minnesota, and the United States, are entering an era of plenty in terms of competing transmission paths, some using rights-of-way and some not needing them at all.

13. With this real-life factual backdrop, it is difficult to take seriously what the critics say about the State of Minnesota's Petition for Declaratory Ruling in CC Docket 98-1.

MARKET DEFINITION AND MARKET POWER CONCERNS

14. Many critics have argued that by virtue of its exclusive physical access to freeway rights-of-way the consortia of ICS/UCN and Stone & Webster will somehow obtain market power in this extremely competitive transmission market for T-I-E services. They argue that use of alternative rights-of-way are either not available for their use (electric and gas pipelines) or are too expensive (railroads). These critics have not conducted any analysis of how the market for transmission will be impacted by imposing limitations on the use of freeway rights-of-way which were previously totally restricted for longitudinal placement. The nation's experience with placement of fiber transmission, and the State's particular experience with deploying T-I-E transmission infrastructure raises no serious concerns regarding the Agreement conferring any market power to the contractor.

15. To begin any analysis of market power it is necessary to define relevant geographic and product markets. The relevant product market for the purposes of CC Docket 98-1 is the provision of transmission capacity for telecommunications-information-entertainment services. Although the State of Minnesota, in its Petition, defined the relevant product market as wholesale fiber capacity, I believe that this is an extremely conservative approach to market definition. In my opinion, the market should NOT be limited to wholesale fiber capacity within the state, since this narrow definition excludes technologies and services that do not use fiber, yet provide reasonable substitutes for fiber capacity, which were listed in the section above.



16. The State of Minnesota is also the appropriate geographic market for the purposes of CC Docket 98-1, as opposed to the extremely limited geographic market suggested by the critics, e.g. freeway rights-of-way. The State of Minnesota as a geographic market is appropriate because, as we have seen, there are multiple paths to customers throughout the state. Increased bandwidth in the state is being supplied by an increasing number of facilities owners, some of which use rights-of-way and some of which do not. Further, there are multiple providers and/or suppliers of rights-of-way. The critics view that the future depends upon a limited stretch of Minnesota's freeways is much too narrow. Minnesota communities can be served not merely by the planned freeway fiber route, but by other fibers using railroads, utilities, pipelines, and private property rights-of-way, not to mention other state trunk highway and municipal rights-of-way. In addition there are a growing number of technologies that provide transmission paths that do not require rights-of-way and that require extremely limited rights-of-way. These include an increasing array of wireless based transmission paths, satellites, broadcasting, and microwave. However even if defined more narrowly, i.e. routes along freeways, my analysis does not change

17. The State of Minnesota is a flourishing T-I-E transmission market, served by a variety of competing companies providing voice, data, video, and Internet transmission capacity. Companies in the State include: MEANS - a consortium of 65 independent telephone companies, AT&T, Sprint, MCI, Norlight, US Link, US WEST, GTE, Frontier, et al. The only area where competition is limited is in the market for state-wide voice grade local exchange telecommunications services, where US WEST and the independent telephone companies maintain a virtual lock on the market -- at least for the time being. Nonetheless, local service competition is taking hold in the Twin Cities metropolitan area for the state's larger volume telecommunications users, who are served by the CLECS such as MFS, Brooks, and MCImetro which are currently being combined into a single entity under the WorldCom umbrella, OCI, which has already constructed a 65 mile loop in the Twin Cities metropolitan area, and TCG, so on to be part of AT&T, has announced plans to develop fiber capacity in the state. MEANS is expanding its fiber network in the state and recently completed a route from the Twin Cities of Minneapolis and St. Paul to Duluth, 150 miles to the north. The network expansion was completed in conjunction with Minnesota Power, the Duluth-based electric utility that serves the Lake Superior port city. Further as noted in Re: Affidavit of Mr. Bhimani, E. Otter Tail telephone company has deployed fiber facilities in Fergus Falls, Infotel is a new fiber based entrant in St. Cloud and Brainerd, and Dakota Telecommunications is seeking to expand facilities in Marshall.

18. Since the passage of the Telecommunications Act of 1996, a new set of possible fiber providers are the gas and electric utilities. These firms already have thousands of miles of fiber optic cables to meet their own communications needs, along with access to public rights-of-way and their own local distribution networks. Many of them could readily compete with local exchange carriers by expanding into wholesale and retail markets; indeed many utilities are now leasing excess fiber capacity to competitive local exchange carriers. Nationally, Wiltel and Enron are utilizing their pipeline rights-of-way to enter the fiber transmission market. Wiltel which was purchased by WorldCom currently owns fiber capacity within Minnesota. Electric companies are also entering the T-I-E transmission

market. For example, Minnesota Power plans to establish a telephony affiliate to lease the power company's fiber capacity. Cooperative Power Association, and United Power Association which recently announced plans to operate as a single entity, also has plans to construct fiber in Minnesota.

19. Another example of alternate rights-of-way to freeways involves railroad rights-of-way. Railroads have been available to telecommunications operators for many years and to state that they are not a viable source of alternate rights-of-way contradicts market experience. In fact, the long distance company, Sprint, started off in 1973 as the microwave communications subsidiary of Southern Pacific Railroad, SP Communications. Its microwave network was initially positioned along railroad track rights-of-way. As the network grew, it became economical to provide private line and interexchange services to high volume businesses and, eventually, to residential customers. In Great Britain, Sprint is using waterways and canals, in addition to railroads to construct a network to compete with BT (British Telecom) and others. MCI utilizes railroad rights-of-way for much of its fiber facilities in Minnesota. More recently Qwest and Level 3 have entered the fiber transmission market nationally via the use primarily of railroad rights-of-way and have plans to build in Minnesota.

20. Clearly, the CLECs have had a traditional reliance on fiber backbone facilities and have obtained rights-of-way from a variety of competing sources (see list in paragraph 6 above). Nonetheless, even the incumbent local telephone companies have been installing fiber facilities within the state and, until CC Docket 98-1, had not complained about either the lack of rights-of-way or the alleged lack of competition within the state regarding the provision of wholesale capacity.

21. Additionally, the growing number of long haul telecommunications service providers within the state -- AT&T, MCI, Sprint, WorldCom, Frontier, Excel Communications (which has just acquired Telco Communications), LCI (which is being acquired by Qwest), and even some of the newer fiber carriers such as Qwest, et al -- have not lodged any publicly available documents specifying difficulties in obtaining rights-of-way in Minnesota or relating shortages in the availability of wholesale capacity.

22. Solid and convincing rebuttals of the arguments of the critics of the State of Minnesota for Declaratory Ruling come from a variety of companies that have recently announced ambitious plans to increase wholesale fiber capacity. Chief among them is the Williams Companies. The natural gas pipeline company said it plans to quickly rebuild the telephone side of its business by serving as a "carrier's carrier", providing wholesale long distance fiber service to companies that then will resell it to individual customers. Williams stayed out of the telecommunications business for three years under an agreement with WorldCom that expired in January, 1998. In the last three years, the company has rebuilt its fiber optic network and provided non-voice services such as transmitting video and data. Now, with an 11,000 mile network already in place, the company has announced that it will spend \$1 billion to expand its network to 18,000 miles of fiber across North America by the beginning of 1999. The company plans to spend an additional \$1.7 billion

by 2001 in order to extend its fiber network to 32,000 miles. Intermedia Communications Inc. (ICI) announced on April 3, 1998, an agreement to buy space on the Williams Companies telecommunications network for about \$450 million. Under the 20-year agreement, ICI receives the right to use about 14,000 route miles of William's network so that ICI can provide high capacity transport for its integrated voice and data services. Other companies that are building or expanding their fiber capacity include Qwest, which plan to connect over 125 cities representing approximately 80% of data and voice traffic originating in the U.S. with a network of 16,285 miles of fiber. The Qwest network will be completed in second quarter of 1999 - way ahead of the Minnesota network. Level 3, another fiber-based carrier, has announced plans to build the "first national telecommunications network using internet technology end-to-end." The Level 3 strategy is based on using railroad rights-of-way. Additionally, Level 3 has signed a data network agreement with Frontier's 13,000 miles SONET fiber optic IP-capable network for a period of five years. PSINet - an internet service provider (ISP) - has completed the purchase of an indefeasible right of use for 10,000 equivalent route miles of fiber from IXC Internet Services, Inc., a subsidiary of IXC Communications. There are other fiber carriers in the midst of building regional and national networks, along with the interexchange carriers, most of the local exchange carriers, the gas and electric utilities, among others. The Affidavit of Mr. Bhimani indicates that these national trends are being experienced in Minnesota as would be expected. MEANS, Dakota Telecommunications, Mcleod U.S.A., Minnesota Power, Digital Teleport, CPA-UPA, are among entities either constructing or planning to construct fiber facilities within the State.

23. Critics of Minnesota's Petition raised an issue that the new fiber link planned along the state freeways would represent market power on the part of the state and/or carrier. The criticisms included, among others, that the developer of the fiber network would have an ability to raise or lower prices in order to chill or eliminate competition, thus giving the developer market power. As Mr. Bhimani's affidavit explains, advances in technology will allow owners of existing dark fiber opportunity to expand capacity immensely at a much lower incremental cost than adding additional fiber. As a result, it is naive to assert that any single entity will develop market power in terms of wholesale capacity when providers in the state have access to these advances. The MIT Dictionary of Modern Economics, edited by David W. Pearce, and published by the MIT Press, operationally defines market power as "the ability of a single, or group of buyers or sellers to influence the price of the product or service in which it is trading. A perfectly competitive market in equilibrium ensures complete absence of market power." This widely accepted definition of market power bears no resemblance to the situation in Minnesota. It is absurd to suggest that the developer has any market power when:

- a) The network will take three years to construct from the scheduled start date in August, 1998.
- b) There will be ample opportunities for competitors to collocate.
- c) There already exists within the state several providers of wholesale fiber capacity, and these entities can easily expand capacity.
- d) There exists alternate rights-of-way for new construction.



- e) Technological developments, for example the introduction of “dense” wave length division multiplexing and the incremental cost for deploying it as compared to installing new fiber, will make it impossible for any single entity to gain market power, either locally or nationally by constraining capacity.

Therefore there are no circumstances that exist today or in the future that will give the developer or the state any market power.

24. Many of the detailed concerns raised by the critics such as the ability to favor an affiliate to discriminate based on service quality; to maintain complete leverage on collocation negotiations; are premised on the notion that the developer can exercise market power. Absent this capability to exercise market power, which the developer does not and will not have, all of the concerns related to contract terms, the potential for abuse, the lack of enforcement, etc., cannot reasonably come to fruition. The FCC has been very concerned about many of these issues in local markets dominated by the incumbent local exchange carriers. However, it is because of the market power of incumbent LECs that the Commission legitimately addressed many of these issues in its orders implementing local competition. Critics assertions that these similar concerns are applicable to the Developer are without any basis in fact, and should be disregarded.

25. It is asserted by the critics that the freeways are the most efficient routes and that they will enjoy a substantial cost advantage. As shown in Mr. Bhimani’s affidavit the cost advantage cited is not material and does not have the effect of prohibiting entities from offering telecommunications capacity and services. To the extent there are benefits, these are shared by entities collocating fiber or leasing capacity. Collocation increases available fiber capacity which promotes competition.

26. There are other “competitive” suppliers of T-I-E transmission which include satellite, broadcast, and wireless providers. Satellite systems that provide voice and data communications systems are beginning to proliferate guaranteeing a highly competitive field of C-Band, KU-Band, L-Band, KA-Band, and Q-Band satellite delivery systems. Recent granting of L-Band licenses to Iridium, Globalstar, Constellation, and MCHL, and applications pending for KA-Band and Q-Band all point to provision of broadband voice, data, and video services, both wholesale and retail. Recent auctioning of Local Multipoint Distribution Service (LMDS) licenses would add broadband wireless capacity to the wholesale and retail market. Personal computer industry giants Microsoft, Intel, and Compaq have joined forces with Ameritech, BellSouth, SBCC-Pactel, US WEST, and GTE to enable consumers to receive Internet data over regular telephone lines at speeds much higher than currently possible. This new alliance is another example of providers ready to expand capacity to meet customer demand.

27. The State of Minnesota has more than adequately demonstrated to the FCC and to the critics of its Petition for Declaratory Ruling that there are no anti-competitive risks associated with the planned construction of the fiber network. The critics have merely put

forward unsubstantiated assertions stating that rights-of-way are a scarce resource, wholesale fiber is difficult to obtain, and the Developer, which has yet to begin construction on the facilities in question, will have market power. Those criticisms should be disregarded by the Commission because they lack any foundation in fact. Indeed the opposite is true - there are competing sources of cost effective alternative rights-of-way, there is also no shortage of wholesale capacity in either Minnesota or in the United States, there are multiple transmission paths and the developer will never be able to exert market power, nor obtain any significant competitive advantage in any market, however that market is operationally defined.

MINNESOTA'S FREEWAY RIGHTS-OF-WAY AND THE TEN YEAR "EXCLUSIVITY" CLAUSE AND COLLOCATION ISSUES

28. A little more than a year ago, a consortium of International Communications Services (ICS), Universal Communications Networks (UCN), and a construction company, Stone & Webster, won through a competitive procurement the right to negotiate to develop Minnesota's fiber optic network. Under the contract ICS-UCN will spend more than \$100 million to construct a 1,800 mile fiber optic network, including three loops going to the northern, southern, and metropolitan area of the Twin Cities. Construction will be completed in three years. In exchange for exclusive, one time only access to the Interstate rights-of-way, all state, city, and county agencies, public and private schools, and universities, will receive free access to the network up to 20% of its active capacity. The contract specifies that the consortium build along rights-of-way of non-interstates, such as state highway and county roads in rural areas. Those routes have been and will remain open for other telecommunications entities. The exclusive physical access lasts for a period of 10 years.

29. As has already been noted, critics are claiming that the contract summarized above gives the network operator market power. The allegations of market power have already been dealt with. However, the developer is introducing a new source of wholesale fiber supply and some of the critics appear to be confusing wholesale fiber supply with market power. It is clear from the above analysis that no new single entrant to the fiber supply market in Minnesota will be able to dominate and/or positively and/or negatively affect the price of wholesale fiber capacity. As we have seen, there are bigger and much more powerful owners of fiber capacity within Minnesota who can assert much more market control than the developer. Ironically, some of these companies are pointing the finger at the State of Minnesota. The new wholesale fiber capacity created if this Petition is approved will add competition within the state and will in no way diminish it.

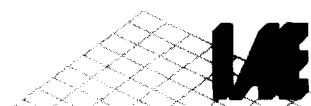
30. Critics have exaggerated the significance of a ten year rights-of-way arrangement suggesting that it will create a so-called capacity constraint in the wholesale fiber market. This is simply not the case, because there are alternative rights-of-way, the developer will offer collocation opportunities, and because technological and software developments are enabling existing fiber capacity to be enhanced. As Mr. Bhimani describes more fully, existing fiber capacity can be cost-effectively expanded by deploying more sophisticated

equipment. Further, as has been amply demonstrated above, there are a variety of alternative rights-of-way that are being used and will continue to be used in order to create additional fiber capacity, if and when it is needed. The critics are using a static model in their analysis, as opposed to looking at the historical and future developments concerning a wide array of telecommunications technological and software developments. There is no available evidence or data to suggest that there is a fiber supply constraint either in Minnesota or in the U.S. or that a ten year closure of the freeway rights-of-way to further development will lead to such a constraint. If this were true, which it is not, failure to open the freeway to development would more quickly create the supply constraints which apparently concerns so many critics. Indeed, the opposite is true; more and more companies are building local and national fiber infrastructures, e.g., The Williams Companies, Qwest, PSINet, Intermedia Communications Inc., Level 3 Communications, Enron, and others are among the relative newcomers. In addition there are ambitious plans being rolled out by the older telecommunications facilities owners, for example AT&T, US WEST and other incumbent local exchange carriers.

31. It was stated earlier that other interested telecommunications facilities entities will have an open opportunity to collocate their fiber capacity with that of the planned ICS-UCN network. Critics claim that the collocation "opportunity" only works for them if their business plans match those of the developer and the state. This, however, is not unique. Every business experiences "windows of opportunity" which are rapidly closed. Competitive firms are quick to respond to opportunities in the market. If the situation is as significant as portrayed, the FCC can anticipate that many firms will move to take advantage of some if not all of the collocation opportunities presented. According to the affidavit of Al Strock, firms are currently negotiating to take advantage of these collocation opportunities.

32. As has been demonstrated above, the shortage of wholesale fiber capacity within the State is NOT a problem, nor are there severe market constraints on the supply of available rights-of-way. To baldly state that Minnesota and its selected contractor have market power takes exaggeration and hyperbole to new levels. The planned network, which will not begin construction until August, 1998, has zero market share. Opponents of the planned network include some of the largest companies in the world -- WorldCom-MFS-Brooks-UUNET, et al, which have recently made a \$37 billion offer to acquire MCI; TCG, which has been sold to AT&T for \$11.4 billion; the cable TV companies in the state, which are linked to the most powerful cable TV conglomerates in the country; the incumbent local telephone companies, which are virtual local exchange monopolies, and include one of the nation's largest, US WEST, which acquired Continental Cable for approximately \$11 billion and renamed it MediaOne. These entities have simply ignored some of their own significant competitive strengths, not simply within Minnesota, but throughout the U.S., and, the rest of the world.

COMPLIANCE WITH SECTION 253 OF THE TELECOMMUNICATIONS ACT OF 1996



33. The crux of CC Docket 98-1 revolves around S.253 of the Telecommunications Act of 1996. S.253, Removal of Barriers to Entry, has four relevant parts that the Commission must weigh in making a policy determination:

- (a) **IN GENERAL** - No State or local statute or regulation...may prohibit or have the effect of prohibiting the ability of any entity to provide any Interstate or Intrastate telecommunications service.
- (b) **STATE REGULATORY AUTHORITY** - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with S.254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
- (c) **STATE AND LOCAL GOVERNMENT AUTHORITY** - Nothing in this section affects the authority of State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of the public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
- (d) **PREEMPTION** - If, after the notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirements that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency (See 47 U.S.C.A., S.253 (a)-(d))

34. The State of Minnesota's Agreement with the Developer does not create a violation of S.253(a). Minnesota has no state or local statute, regulation prohibiting the ability of any entity to provide interstate or intrastate telecommunications service. Indeed Minnesota is desirous to open its freeway rights-of-way to development and promote the provision of competitive services. For the reasons described above (alternative rights-of-ways, existing capacity, ease of expansion) the State's Agreement does not have the effect of prohibiting the ability of any entity to provide such services.

35. Minnesota's project also meets the requirements of S.253(b). Public safety and welfare are advanced. State highways are vastly different from rights-of-way controlled by railroads, utilities, and pipelines, the three most popular providers of rights-of-way for wholesale capacity fiber transport. Highways are open to all licensed operators of vehicles. Railroads, on the other hand, are highly controlled regarding who travels on the railroad



tracks and under what terms and conditions. Deaths and accidents on railroads are negligible. Deaths and accidents on highways are numerous. Utilities and pipeline operators are similarly in much more control of access to their facilities than are highways. Also, deaths and accidents on utility routes and pipelines are negligible. The higher speeds and higher traffic volumes experienced on freeways make public safety a much more serious issue concerning the operation of highways than it is for owners of rights-of-way. As discussed below, when the State exercises restrictions based on public safety, it must do so in a competitive neutral manner. Competitive neutrality is achieved through a competitive procurement with the assurance of access to all entities seeking use of the freeway rights-of-way during construction via collocation or subsequent to it via purchase of dark fiber or lease of lit fiber to all comers on a non-discriminatory manner.

36. Minnesota has met the requirements of S.253(c) in establishing fair and reasonable compensation from telecommunications companies for rights-of-way, on a competitively neutral and nondiscriminatory basis. This was done by establishing a completely open, nondiscriminatory, competitive procurement process similar to the spectrum auctions overseen by the FCC. No one was precluded from the competitive procurement process either individually or collectively in consortia. Further the requirement to allow for collocation and to purchase or lease on a non-discriminatory basis assures that there is non-discriminatory virtual access to the freeway rights-of-way. This approach fulfills the requirement of (c).

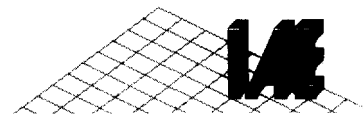
37. As a result of the above analysis, the Commission should feel comfortable that adequate steps were taken by the State to fulfill the pro-competitive objectives of Section 253 of the Act. While it is unlikely that such a situation was foreseen by the drafters of the Act, the State of Minnesota's legitimate exercise of its public safety and rights-of-way management authority when balanced against the fact that there will be no harm to competition, and the fact that the State has accommodated the interests of other entities wishing to place fiber in the rights-of-way, demonstrate a balanced approach that should be supported by the Commission.

FINDINGS AND CONCLUSIONS

38. At least seven categories of suppliers are available to entities requiring rights-of-way for the construction of T-I-E transmission facilities within the State of Minnesota and the United States. There is no sign of an imminent or future shortage of access to rights-of-way, given the current and planned sophistication of the various T-I-E infrastructure providers, and given the fact that those infrastructures can be rapidly expanded in terms of speed and capacity by using current technologies.

39. There are an increasing number of entities demanding or seeking rights-of-way, but there is no sign that any individual owner of rights-of-way is able to exert market power.

40. Competing technologies provide transmission paths that do not generally require rights-of-way, for example satellites, digital microwave, wireless, and broadcasting.



41. Overall infrastructure capacity is being expanded not just by competing companies using competing transmission paths, but also by technological developments that increase speed and bandwidth, thus avoiding the onset of market power that can be exerted by a single supplier or a group of suppliers of transmission capacity.

42. The appropriate market definition for the purposes of CC Docket 98-1 is the provision of competing mediums for the purposes of transmitting voice, data, and video within the State of Minnesota. The relevant product market is transmission capacity for T-I-E services. The above analysis has amply demonstrated that the Minnesota market is well served by a variety of competing transmission paths which are in the process of being expanded to provide more bandwidth and faster speed. Consequently, there is no opportunity for any single transmission path owner or group of transmission capacity owners acting as a cartel to assert market power. The same is true of the more conservative definition of product market, the market for wholesale fiber capacity, selected by the State.

43. Following an open and competitive procurement process, similar to the FCC's Congressionally mandated spectrum auctions, the Minnesota Department of Transportation and the Department of Administration granted exclusive one time physical access to the freeway rights-of-way for a period of 10 years to an entity that will construct a 1,800 mile fiber network. State owned freeway rights-of-way in Minnesota and other states are significantly different with respect to security of access than the other competing rights-of-way, e.g., railroads, utilities, pipelines, etc. Safety, security, and access can be controlled more easily by railroads, utilities, and pipelines. Access to state freeway is open to all authorized licensed drivers. As a consequence, the opportunities for accident are greatly increased. So, in order to create an opportunity for competing transmission companies to gain access to freeway rights-of-way in Minnesota, the State and the developer of the network are obligated to collocate other transmission facilities of owners that express an interest in collocation.

44. As a result of the foregoing, the process undertaken by the State is pro-competitive, competitively neutral, does not create any entry barriers and is non-discriminatory. In short, it fulfills each and every requirement of S.253 of The Telecommunications Act of 1996.

Signed

Alan Pearce

Date

April 8, 1998

Subscribed and sworn to before me on

Candace Y. Blackwell
NOTARY PUBLIC

CANDACE Y. BLACKWELL
NOTARY PUBLIC STATE OF MARYLAND
4/7/98 My Commission Expires February 28, 2001

EXHIBIT 5

STATE OF COLORADO)

)SS

COUNTY OF DENVER)

**AFFIDAVIT OF
Al Strock**

1. My name is Al Strock, I am President of ICS/UCN,LLC, a limited liability company.
2. As the project Developer, ICS/UCN has plans to obtain financing for a project of over \$100 million in Minnesota for deployment of fiber optic cable.
3. As part of ICS/UCN 's business plan for the project, we have anticipated sharing a portion of these construction costs with collocating entities. It is imperative for ICS/UCN to obtain colocated customers in order to make the project a success
4. ICS/UCN is currently in negotiations with several telecommunications entities who wish to collocate facilities. ICS/UCN understands that these entities do not need to place fiber facilities throughout the State but can do so on any portion of the freeway rights of way they choose. It is in ICS/UCN's business interest to obtain as many collocating customers as possible and to schedule construction in a manner that meets their needs and the needs of the state.
5. ICS/UCN does not have an affiliate nor does it have any plans to enter the telecommunications cable or Internet service markets via an affiliate. Our business is as a wholesaler of fiber capacity to be constructed, sold or leased to other telecommunications entities.

Further your affiant sayeth not

Signed: _____

Date: 4/8/98

Subscribed and sworn to before me on

NOTARY PUBLIC

Jaime L Baggo

08/22/1999

EXHIBIT 6

GUIDE

February 1998 No. 3

Exclusive Use of Right-of-Way for Free Telecom Service — *At What Price?*

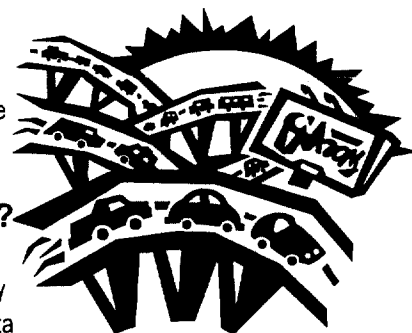
The State of Minnesota has announced a 10-year agreement that grants exclusive use of the state's interstate freeway right-of-way (ROW) to a private consortium to build an 1,800-mile high-speed fiber optic telecommunications network. In exchange, the state and all public bodies — including schools, colleges, universities, libraries, and municipal governments — can use up to 20 percent of the network free.

The network, called "Connecting Minnesota," could handle 3 million users simultaneously and will cost over \$100 million to build. The two agencies that negotiated the contract, which the parties can extend an additional 20 years, are the state departments of Transportation (MNDOT) and Administration. They have asked the Federal Communications Commission (FCC) to rule whether the contract with the consortium (ICS/UCN and Stone & Webster) violates the federal

Telecommunications Act of 1996, which prohibits exclusive use of freeway ROW.

Good Public Policy?

"We think the contract violates federal law," says Jerry Knickerbocker of the Minnesota Telephone Association, "but beyond that, the agreement alters the relationship between government and the private sector. Its exclusive nature means the state is unfairly helping one company at the expense of others." The length of the contract also disturbs him. "People have 30-year mortgages, but should

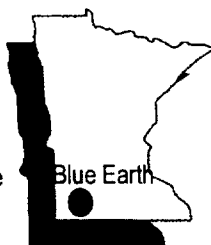
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PROFILE: Blue Earth Valley Telephone

When the area's economy was down in the '80s, some Blue Earth businesses talked about leaving. But Blue Earth Valley Telephone took a proactive approach, equipping a building in a dilapidated strip mall with such "telecom-smart" features as a videoconferencing center. Today, the center boasts 16 businesses, no business talks about moving, the entire mall is full and thriving, and

they are in the process of adding 12,000 square feet.

But Blue Earth Valley Telephone has taken care of its neighbors for more than a century. The company serves a large area of Southern Minnesota's Faribault County, but its approximately 8,000 customers still have access to state-of-the-art technology, including miles of fiber optic cable. And the company's



parent company — which also owns a cellular phone company, an Internet provider in Fairmont, and local phone companies in New Prague and Minnesota Lake — employs 73 community-minded employees. Blue Earth Valley Telephone Company employees support their communities and are active volunteers in numerous local organizations.

Susan Eckles, company vice president and director of marketing and public relations, calls the telecommunications business "fast-paced, exciting and fast-changing. It's vital to everyone's future," she adds, "that we keep up with the challenges this field offers. We consider ourselves a customer-driven company. We're constantly upgrading because we only succeed when we meet our customer's expectations."

the state obligate itself to an exclusive agreement for that long? If a better technology comes along, we might be unable to take advantage of it."

The telephone industry is concerned that the Legislature was not consulted before or during contract negotiations and will have no oversight of state telecom policy for a long time. (The state can renegotiate the contract after 10 years, but only with the consortium.)

The state describes the network as a "backbone" that will provide more advanced capacity to rural areas and save MNDOT the expense of installing cable for its intelligent traffic systems. The state and public bodies also get more capacity while saving dollars currently spent on dedicated lines. Bill Schnellman, the DOA director who manages state telecommunications, says there is no high-speed rural network in place. "This isn't costing the state or local phone companies anything," he says, "so why not do it?"

Concerns about Greater Minnesota, Competition

Local phone companies argue that a high-speed network does exist. They also think that free public access will come at the expense of rural telephone customers and may hurt economic development in Greater Minnesota. "With big users removed from the public-switched network, everyone else will pay more," Knickerbocker predicts. "With a smaller customer base, local phone companies will be forced to deploy advanced services at a slower pace and rural economies will suffer."

Adeel Lari of MNDOT says the backbone, which he compares to a road system, should help local phone companies. "If there's more traffic on freeways," he says, "then there's more local traffic as well." Schnellman says the state

has no intention of abandoning local providers. "The public sector will still use local companies when it needs private lines to connect to the backbone. We're not out to put local providers out of business. We'll use them as much as we can. But we're only doing what any organization would do to meet its needs and keep costs down."

The MTA questions how those costs will be monitored because the contract doesn't mention how rates will be controlled. Schnellman

and Lari believe market forces will provide control. "If the company's prices aren't competitive, it won't be able to sell its services," says Schnellman, "because it won't be the only game in town, the only way to get to other places. And how is it going to recover its investment if it isn't neutral and competitive?" But that may not be the problem. "What's to stop the project builder from undercutting competitors unfairly?" Knickerbocker asks.

Lari says choosing one company to build the network was a compromise between safety and competition. The contract's exclusivity prevents problems with multiple vendors burying cable along freeways. Lari also points out that any vendor can have its own cable buried by the consortium, though it must be done when the consortium buries its cable. That means other vendors have one opportunity in 10 years.

"Not a Real Opportunity"

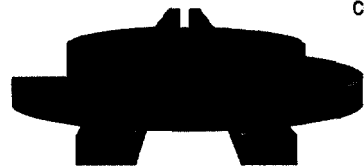
This option is "totally impractical, not a real opportunity," says Paul Hoff, general manager/CEO of Park Region Mutual Telephone Company, Underwood. "A company's decision to lay cable is not made lightly," he explains. "You have to set design criteria, get financing and purchase everything. The sun, moon and stars would have to line up, or something of that magnitude would have to happen, before any company could lay its cable exactly when the consortium was doing it." Hoff also disputes the idea that the current network is not advanced. "There is plenty of capacity that isn't used now," he says. "And all that's needed to enhance fiber optic cable buried years ago are new lasers."

Though no one disputes that digging on freeways is a legitimate safety issue, telecom providers wonder why Minnesota is the only state that will restrict access to interstate ROW to one telecom company. "The contract won't stop electric, natural gas and other utilities from digging on interstates," says Knickerbocker. "So why are other phone companies the only ones excluded?"

Uncharted Territory

As the first state to make a deal like this, Minnesota has entered uncharted territory. That's why Knickerbocker wants the whole issue reconsidered. "At the very least," he says, "the financial arrangements of this deal cry out for legislative oversight. What lending institution would finance a venture where the biggest customer gets free service for decades? And what if the consortium can't make a profit? Won't the state get more involved because it wants the project to work? This contract risks too much for too long. That's why the Legislature should look at it after the FCC makes its decision."

"With big users removed from the public-switched network, everyone else will pay more," Knickerbocker predicts. "With a smaller customer base, local phone companies will be forced to deploy advanced services at a slower pace and rural economies will suffer."



A Minnesota Fact

Minnesota telephone companies contribute to the economic health of the state. Employing nearly 8,000, the local telephone industry reports an annual combined payroll contribution of more than \$260 million. On a national scale, the Bureau of Labor Statistics recorded 826,000 people employed in the telephone communications industry in 1996.

The Minnesota Telephone Association is a professional membership association established in 1909. Its members include incumbent and competitive local telephone companies, long distance companies, wireless providers and suppliers to Minnesota's telecommunications industry. 1650 Minnesota World Trade Center, 30 E. 7th St., St. Paul, MN 55101. www.mnta.org Phone: 612/291-7311 Fax: 612/291-2795

EXHIBIT 8

STATE SURVEY ON PLACEMENT OF FIBER OPTIC CABLE ON INTERSTATES

Thirty four states were surveyed regarding their policies on longitudinal placement of fiber optic on the Interstate rights-of-way. The following table summarizes the key findings of this survey.

| States permitting exclusive or multiple access to providers for placement of fiber optic cable on Interstate rights-of-way: | States not permitting fiber optic cable placement on Interstate rights-of-way: |
|---|---|
| Arkansas California Iowa Maryland Massachusetts New York Texas Wisconsin | Alaska Arizona Colorado Delaware Florida Idaho Illinois Kentucky Louisiana Maine Mississippi Montana Nebraska New Hampshire North Dakota Oregon Pennsylvania Utah Vermont Virginia Washington West Virginia Wyoming |

In some cases, current policies concerning the placement of fiber optic cable on Interstate rights-of-way were not explicit. Of those states permitting the placement of fiber, five allow it on an exclusive basis. In addition, several other states were trying to move toward an exclusive environment.